United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

NO. 74-4264

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

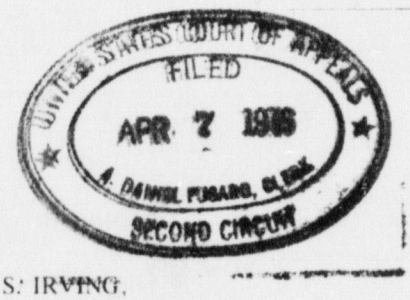
v.

POLLACK ELECTRIC COMPANY, INC.,

Respondent.

On Application for Enforcement of an Order of
The National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD



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INDEX

AUTHORITIES CITED

Cases:

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STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's findings that the Company violated Section 8(a)(1) of the Act by (a) threatening its employees with loss of jobs because of their union activities; (b) promising its emp. yees benefits for refraining from union activities; and (c) coercively interrogating its employees about their union activities.

2. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by laying off and terminating its employees because of their union activities.

3. Whether the Board's assertion of jurisdiction over the Company was proper.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*), for enforcement of its order (A. 27-28, 23-25)[1] against respondent Pollack Electric Company, Inc. ("the Company") issued on April 21, 1975 and modified on August 25, 1975. The Board's decision by Chairman Murphy and Members Jenkins and Pennello is reported at 219 NLRB No. 195. This Court has jurisdiction of the proceedings, the unfair labor practices having occurred in Brooklyn, New York, where the Company's office and shop are located.

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[1] "A" references are to pages of the printed appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the Company violated Section 8(a)(1) of the Act by coercively interrogating its employees about their union activities, by threatening them with discharge because of their union activities, and by promising them benefits if they would refrain from union activities. The Board also found that the Company violated Section 8(a)(3) and (1) of the Act by laying off its employees because of their union activities. The facts upon which the Board based its findings are summarized below.

The Company is an electrical contractor and does electrical installations and repairs in New York State (A. 4; 44). In 1973[2] the Company purchased goods and materials valued at $3,600 from firms in New York which had received those goods and materials from firms located outside New York. During the same year the Company performed services valued at $18,294 for companies which were directly engaged in interstate commerce (Park Avenue 71st Street Corporation, $12,285; Polymer Research Corporation, $2,150; Sea Coast Towers, A Division of Alex Muss & Sons, Inc., $3,359; Man Size, Inc. d/b/a He Man or Man Size Shops, $465). (A. 4; 45-46).[3] At the time of the unfair labor practices herein, the Company, in addition to Foreman John Amorgianos, had six employees: George Handrinos, Thomas Nastos, Gus Moustogiannis, Al Rescigno, Eugene Moretti, and Steve Krellenstein (A. 6; 117-119).

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[2] Unless otherwise stated, all dates refer to 1973.

[3] These facts are relevant to the question concerning the Board's assertion of jurisdiction over the Company, discussed *infra*, pp. 15-19.

In late October or early November, two representatives of the Union[4] approached Foreman John Amorgianos and employee Thomas Nastos at a filling station where they had stopped en route to a jobsite. The representatives asked the two men whether they were interested in the Union. Amorgianos responded that he did not like Local 3. Nastos said he would have to think about it and accepted some union authorization cards to distribute, although he and four other employees had already signed cards at the local office of the Union. (A. 10-11; 87, 107-108).[5] As they left the station Amorgianos told Nastos that Pollack[6] did not like the Union because its wage scales were too high and that if the employees signed up with the Union they would lose their jobs (A. 11; 87). When he arrived at the jobsite Amorgianos repeated to Handrinos and Moustogiannis that those who signed with the Union would lose their jobs. Nastos then threw the cards in the trash (A. 11; 47-48, 87).

About November 23, the Union filed a petition for certification as collective bargaining representative for the Company's employees with the New York State Labor Relations Board (NYSLRB) (A. 35-36, fn. 3). On November 30, Pollack received a letter from the NYSLRB notifying him of that petition, which he opened at the shop in the presence of most of the employees. (A. 12; 51-52, 72-73, 88). After reading the letter, Pollack stated that some employees had joined the Union, and asked them to identify themselves (A. 12; 51-52). No one answered.

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[4] Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO, hereinafter "the Union".

[5] On November 29, the sixth employee, Rescigno, also signed a card (A. 10; 98).

[6] Ralph Pollack, owner and president of the Company, and an admitted supervisor and agent for the Company (A. 6, fn. 6; 116).

Amorgianos repeated Pollack's request in English and Greek[7] and, in Greek, told the employees to "be a man" and admit what they had done (A. 12; 51-52, 72-73, 88). Finally Nastos and Moustogiannis responded. Amorgianos asked them in Greek why they had done this without telling him, and then relayed their admissions in English to Pollack (A. 12; 52, 88, 107-108).

The following day, December 1, Amorgianos telephoned Nastos and Moustogiannis and informed them that they and the other employees were laid off, and that he had warned them that this would happen if they joined the Union (A. 13; 89, 113). This message was relayed to the other employees, and later confirmed in a telephone conversation between Amorgianos and Handrinos. (A. 13; 52-54, 89, 99). Amorgianos also told Krellenstein either that day or the next that if he joined the Union he would not be working for Pollack. If he stayed with Pollack, Amorgianos indicated, he would have a job and receive more money and benefits; and he asked Krellenstein which he wanted. When Krellenstein replied that he wanted to stay at Pollack, Amorgianos said he would contact him later (A. 13; 73, 79).

On Monday, December 3, the employees went to the shop to pick up their tools (A. 14; 54, 73-74, 89, 99). When they arrived Pollack told them that they were not fired, but laid off because work was slow. He asked them why they had joined the Union. Nastos answered that they had joined to obtain better pay and benefits. Pollack told them that they should have talked to him first, that there were better unions

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[7] Many of the employees were Greeks who spoke little English. Thus Amorgianos often addressed them in Greek (A. 4; 126-127).

which he could have gotten them into, and that if they had not gone behind his back he would have helped them do so. (A. 14; 54-55, 74-75, 89-90, 100). After most of the employees left, Pollack questioned Rescigno and Krellenstein, who had stayed behind, on their views about the Union. They refused to respond (A. 15; 100). The following day, December 4, Pollack telephoned Rescigno to ask whether he had informed the Union of his current wages. Pollack also asked who had gone to the union hall. (A. 15; 100-101). When Rescigno responded that he had not gone to the hall and did not know who had, Pollack told him to return to work the next day (A. 15; 100-101).

Both Rescigno and Krellenstein, whom Pollack also called on December 4, reported back to work on December 5 (A. 16; 75, 100-102, 130). On December 7, Amorgianos told Krellenstein that Handrinos, Moustogiannis, and Nastos would never be accepted by the Union because of their "language barriers" and that Krellenstein would not get in because he did not "know enough." Only Rescigno, he indicated, would be acceptable to the Union. Then he asked Krellenstein if he was still interested in the Union. Krellenstein responded that he was interested only in working and gaining experience in the electrical field (A. 16; 76-77). Handrinos, Nastos, and Moustogiannis were called back to work for one day, December 6. The next day they were again laid off, despite the fact that there was unfinished work at the jobsite where they were working (A. 17; 55-57, 62, 63-65, 90-91, 107-108).

On December 19, the Union filed a petition with the Board for certification as collective bargaining representative of the Company's employees, having withdrawn its petition with the NYSLRB because the Company asserted at a hearing before that agency that the NLRB had jurisdiction over it (A. 16; 35-36, fn. 3). On January 11, the date of the Board hearing on the Union's petition, Rescigno and Krellenstein, who had

been steadily working since December 5, were laid off (A. 17; 77-78, 100-102). At the jobsite where they were working, substantial tasks were left uncompleted (A. 17; 79-80, 102-103, 112).[8]

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board found that the Company's threats, promises of benefits, and interrogations relating to its employees' union activities were violative of Section 8(a)(1) of the Act. The Board also found that the Company violated Section 8(a)(3) and (1) of the Act by the December 1 layoffs of Handrinos, Krellenstein, Moustogiannis, Nastos and Rescigno, and termination of Moretti; and the December 7 terminations of Handrinos, Moustogiannis, and Nastos and January 11 terminations of Krellenstein and Rescigno, because of their union activities.

The Board's order requires the Company to cease and desist from the unfair labor practices found, and from in any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization. Affirmatively, the order requires the Company to notify its employees that it will cease and desist from the unfair labor

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[8] A Board election based on the Union's petition was conducted on February 8, 1974, at which challenged ballots were cast by the six discharged employees. A seventh ballot cast by Amorgianos was challenged by the Union on the ground that he was a supervisor (A. 35-36). The issues pertaining to the challenged ballots were consolidated for hearing with the instant unfair labor practice proceeding. No issue pertaining to the representation proceeding is before the Court for consideration at this time. See *Hendrix Mfg Co. v. N.L.R.B.*, 321 F.2d 100, 106 (C.A. 5, 1963) and cases cited.

practices found, to offer the discriminatees reinstatement, to reimburse them for lost wages, and to post an appropriate notice.[9]

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY THREATENING ITS EMPLOYEES AND PROMISING THEM BENEFITS IN ORDER TO DISCOURAGE THEIR UNION ACTIVITIES, AND BY COERCIVELY INTERROGATING THEM ABOUT SUCH ACTIVITIES.

As shown in the Statement, as soon as Company President Pollack and Foreman Amorgianos learned of the organizational activities of their employees, they launched a vigorous campaign against the Union.[10] Among the tactics which they resorted to were threats of reprisals and promises of benefits. These included Amorgianos' threat in late October

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[9] The Board in its order also overruled the challenges to the ballots of Handrinos, Nastos, Moustogiannis, Moretti, Krellenstein, and Rescigno, and remanded the case to the Regional Director with directions to open and count those ballots, and to issue a revised tally of ballots and appropriate certification. The challenge to Amorgianos' ballot was sustained by the Board. (A. 26-28).

[10] Before the Board, the Company sought to avoid responsibility for some of the unlawful conduct with which it is charged by asserting that Amorgianos was not a supervisor within the meaning of Section 2(11) of the Act. The Board properly found, however, on the basis of the evidence that Amorgianos was the Company's foreman and at all relevant times possessed and exercised the powers of a supervisor (A. 6-10). Thus, Amorgianos interviewed and hired most of the employees without consulting Pollack (A. 6-9; 46, 67-68, 69-70, 84-85, 143-144). Amorgianos directed the employees in their daily work; thus he gave out job assignments, issued instructions regarding particular projects, laid out work for mechanics and helpers, and transported employees to their jobsites (A. 6-9; 47, 71-72, 81-82, 92-97). He disciplined the employees, summarily sending both Rescigno and Handrinos home for reporting late to work (A. 6-9; 98, 146). Handrinos and Nastos directed their requests for raises to him, raises which they subsequently received (A. 8; 68-69, 85, 92, 94). Amorgianos also unilaterally granted requests by Nastos and Moustogiannis for time off

(continued)

or early November that employees who signed union cards would lose their jobs; and his December 1 warning to Krellenstein that if the employees joined the Union he could not work for the Company and promise that if Krellenstein chose his job over the Union he would receive more money and benefits. Similarly unlawful was Pollack's December 3 promise to get the employees into a better union if they abandoned Local 3. Such indications by an employer of the serious consequences of engaging in union activities inevitably interfere with the free exercise by employees of their statutory rights. Hence, it is well-settled that ". . . such promises of benefits and threats of reprisals plainly aimed at discouraging union activity are . . . violative of Section 8(a)(1) of the Act."

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[10] (continued) (A. 8-9; 92-94, 143-144). Pollack treated Amorgianos as next in command. When Pollack took a vacation in 1971, Amorgianos ran the business for him during his absence (A. 7, 9; 104, 138-139, 148). On one occasion Rescigno asked Pollack if he could take orders from him rather than Amorgianos, and Pollack answered that Amorgianos was his foreman and therefore he could not grant Rescigno's request (A. 7; 149). Pollack saw Handrinos leaving when Amorgianos sent him home for reporting late to work, asked why he was leaving, and made no response to the information that he was being disciplined by Amorgianos (A. 8, 9; 146-147). And when Moustogiannis met Pollack after Amorgianos hired him, Pollack asked Amorgianos what Moustogiannis was being paid (A. 9; 143-144). The foregoing facts, we submit, fully support the Board's finding that Amorgianos was a supervisor within the meaning of Section 2(11) of the Act. *Amalgamated Local 355 v. N.L.R.B.*, 481 F.2d 996, 1000 (C.A. 2, 1973); *N.L.R.B. v. Big Ben Department Stores, Inc.*, 396 F.2d 78, 82 (C.A. 2, 1968); *N.L.R.B. v. Raymond Buick, Inc.*, 445 F.2d 644, 645 (C.A. 2, 1971). The Company also attempted to avoid the onus of Amorgianos' unlawful actions by contending he acted contrary to Pollack's wishes and thus was not its agent. It is settled, however, that "an employer will be charged with responsibility for the acts of his supervisory employees when its employees would have just cause for believing that he was acting on behalf of the Company." *Trey Packing, Inc. v. N.L.R.B.*, 405 F.2d 334, 338 (C.A. 2, 1968), cert. denied, 394 U.S. 919. See also, *Irving Air Chute Co. v. N.L.R.B.*, 350 F.2d 176, 179 (C.A. 2, 1965). Here Pollack plainly and repeatedly indicated to his employees that Amorgianos was empowered to act for the Company, that he accepted without question or prior consultation Amorgianos' decisions with respect to hiring, wages, discipline, and the day-to-day operation of the business. Having thus vested Amorgianos with such authority, the Company is charged with responsibility for his actions, regardless of whether they comported with Pollack's wishes at the time they occurred.

N.L.R.B. v. Scoler's, Inc., 466 F.2d 1289, 1292 (C.A. 2, 1972). See also, *United Aircraft Co. v. N.L.R.B.*, 440 F.2d 85, 93 (C.A. 2, 1971); *N.L.R.B. v. Marsellus Vault and Sales, Inc.*, 431 F.2d 933, 937 (C.A. 2, 1970).

Another tactic used by the Company in its campaign against the Union was interrogation of employees about their union activities. Such interrogation, though not *per se* unlawful, violates Section 8(a)(1) of the Act "if it is coercive in light of all of the surrounding circumstances." *Retired Persons Pharmacy v. N.L.R.B.*, 519 F.2d 486, 492 (C.A. 2, 1975). See also, *N.L.R.B. v. Lorben Corp.*, 345 F.2d 346, 347-348 (C.A. 2, 1965). Among the factors which this Court has held indicative of coercion are: "(1) The background, *i.e.*, is there a history of employer hostility and discrimination? (2) The nature of the information sought, *e.g.*, did the interrogation appear to be seeking information on which to base taking action against individual employees? (3) The identity of the questioner, *i.e.*, how high was he in the company hierarchy? (4) Place and method of interrogation, *e.g.*, was the employee called from work to the boss's office? Was there an atmosphere of 'unnatural formality'? (5) Truthfulness of the reply." *Bourne v. N.L.R.B.*, 332 F.2d 47, 48 (C.A. 2, 1964). See also, *Retired Persons Pharmacy v. N.L.R.B., supra*, 519 F. 2d at 492; *N.L.R.B. v. Gladding Keystone Corp.*, 435 F.2d 129, 132 (C.A. 2, 1970); *N.L.R.B. v. Milco, Inc.*, 388 F.2d 133, 137 (C.A. 2, 1968). For interrogation to be unlawful, however, it is not necessary that all of the *Bourne* criteria be present; nor is the *Bourne* list exhaustive: it sets forth "some of the many factors that must be considered anew in each case." *Retired Persons Pharmacy v. N.L.R.B., supra*, 519 F.2d at 492, quoting *N.L.R.B. v. Lorben Corp., supra*, 345 F.2d at 347-348. See also, *N.L.R.B. v. Gladding Keystone Co., supra*, 435 F.2d at 132; *N.L.R.B. v. Long Island Airport Limousine Service*, 468 F.2d 292, 297 (C.A. 2, 1972). If

union-related threats accompany the interrogation, for example, they may provide sufficiently compelling evidence of coercion to compensate for the absence of a number of the *Bourne* indicia. See *N.L.R.B. v. Rubin*, 424 F.2d 748, 751 (C.A. 2, 1970); *N.L.R.B. v. Milco, supra*, 388 F.2d at 137. Such threats, which implicitly convey the possibly dire results of the interrogation, give rise to as inescapable an inference of coercion as if the employer's questions exhibited all of the *Bourne* characteristics.

Measured by these criteria, the Company interrogation at issue herein clearly was coercive. The obvious purpose of the information sought during this activity was to enable the Company to identify and retaliate against the supporters of the Union. Thus, on November 30, employees were exhorted by Pollack and Amorgianos to "be a man, tell the truth" and confess their affiliation with the Union; and on December 3, 4, and 7, Pollack and Amorgianos, in the guise of soliciting employee opinions about the Union, sought to impel employees to reveal their union sympathies. Significantly, Company President Pollack and Foreman Amorgianos, the top two Company officials, carried out all of the interrogations. And each instance of questioning, though not carried out in a "boss's office" or other "formal" surroundings, occurred in a tense atmosphere. Thus, in the November 30 interrogation employees were asked to admit their "guilt" before fellow workers as if involvement in union activities were shameful; and the questioning on December 3, 4, and 7 occurred after the initial layoffs and hence, at a time when the employees were under great pressure because they knew their jobs were at stake. And, finally, nearly all of the interrogation met with evasive or untruthful replies. Of the six employees who signed cards, only two identified themselves on November 30. On December 3, both Rescigno and Krellenstein refused to answer Pollack's queries about their views on the Union. The following day Rescigno falsely denied to Pollack that he had been

to the Union hall. And although Krellenstein was an early Union supporter, he sidestepped Amorgianos' December 7 question about his interest in union representation. Clearly, these were the responses of employees so intimidated and coerced by their interrogators that they dared not give a truthful response. Further, the threats of reprisal for engaging in union activity and promises of benefits for refraining from it, with which the Company supplemented its interrogations, provide the most conclusive evidence of the coerciveness of this questioning. These threats and promises unmistakably indicated that the Company's questions were not idle and that honest responses could result in adverse consequences for the employees. In the circumstances presented, we submit, the Board was fully warranted in finding that the Company's interrogation of employees was violative of Section 8(a)(1) of the Act. See cases cited *supra*, p. 11.

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY LAYING OFF AND TERMINATING ITS EMPLOYEES BECAUSE OF THEIR UNION ACTIVITIES.

Section 8(a)(3) and (1) of the Act prohibits layoffs or discharges motivated by employee exercise of the right "to self-organization, to form, join or assist labor organizations" guaranteed by Section 7 of the Act. "Rarely," however, ". . . does an employer admit that an employee has been discharged for engaging in union activities." *Betts Baking Co. v. N.L.R.B.*, 380 F.2d 199, 204 (C.A. 10, 1967). Thus, in determining the motivation for a layoff or discharge the Board may rely upon circumstantial evidence as well as direct, and may draw reasonable inferences from all the surrounding circumstances. *N.L.R.B. v. Long Island Airport Limousine Service*, 468 F.2d 292, 295 (C.A. 2, 1972). *N.L.R.B. v. Dorn's Transportation Co.*, 405 F.2d 706, 713 (C.A. 2, 1969); *J.P. Stevens Co.*

v. N.L.R.B., 380 F.2d 292, 300, 301 (C.A. 2, 1967), cert. denied, 389 U.S. 1005; *N.L.R.B. v. Park Edge Sheridan Meats, Inc.*, 341 F.2d 725, 728 (C.A. 2, 1965). Such factors as the abruptness of a layoff or discharge or its timing may, for example, be "persuasive evidence of its motivation." *N.L.R.B. v. Montgomery Ward & Co.*, 242 F.2d 497, 502 (C.A. 2, 1957), cert. denied, 355 U.S. 829. See also, *N.L.R.B. v. Long Island Airport Limousine Service, supra*, 468 F.2d at 295; *N.L.R.B. v. L.E. Farrell Co.*, 360 F.2d 205, 208 (C.A. 2, 1966). Moreover, a reviewing court ordinarily will not disturb the Board's inferences, so long as they are substantially supported in the record. As this Court stated in *N.L.R.B. v. Milco, Inc., supra*, 388 F.2d at 138, ". . . we must first look at the facts and circumstances which the Board interpreted as showing an anti-union motive, and then ask whether these seem to furnish satisfactory support for the Board's conclusion. While evaluating these . . . the standard . . . is that we may upset the finding of the Board only if there is not substantial evidence to support it." Thus, a court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951).

Here, both direct and circumstantial evidence support the Board's conclusion that the Company laid off and terminated its employees because of their union activities. Thus, the Company twice explicitly stated its motive for the layoffs – in its initial threat that employees who signed union cards would lose their jobs, and in Amorgianos' remark to Nastos when he notified him of the December 1 layoffs that he had told him earlier that this would happen if the employees joined the Union. The Company's subsequent battery of union-related threats, interrogations, and promises of benefits, and its immediate rehiring of the two employees who succumbed to its efforts to have them disavow the Union clearly

demonstrated that its opposition to the Union never waned, and hence, that this hostility also motivated the final terminations on December 7 and January 11. The "stunningly obvious" (*N.L.R.B. v. Long Island Airport Limousine Service, supra,* 468 F.2d at 295) timing and abruptness of both the December 1 and the January 11 layoffs – on the day after the Company received the NYSLRB petition and the day of the hearing on the NLRB petition, respectively, provided further confirmation of this unlawful motive.

Before the Board, the Company defended the layoffs and terminations on the ground that its volume of work declined after December 1. The record shows, however, that work was left uncompleted at the jobsites from which the employees were laid off and thus that the Company was quite willing to neglect available work in order to thwart the Union. The Company's drop in gross revenue which followed the layoffs therefore clearly was attributable, as the Board found, to the Company's decision to cut back its work to avoid unionization; in other words, the decline in business was the result rather than the cause of the layoffs (A. 17-18). The Board found that when the employees disregarded the Company's warnings that they would be terminated if they sought union representation, Pollack "simply gradually reduced his commitments after December 1, to a point [where] he and Amorgianos could perform the work, laying off the rest of the employees". (A. 18). Moreover, even if economic considerations had figured in the Company's determination to terminate its employees, the action would nonetheless be unlawful. For ". . . the existence of a lawful cause for discharge does not insulate an employer from a determination that it violated Section 8(a)(3) if the Board makes a finding supported by substantial evidence that the discharge was at least partly for union activities." *N.L.R.B. v. Gladding Keystone Corp., supra,* 435 F.2d at 131-132. See also, *N.L.R.B. v. Dorn's Transportation Co., supra,* 405 F.2d at 713.

III. THE BOARD'S ASSERTION OF JURISDICTION OVER THE COMPANY WAS PROPER.

The Board is empowered under Section 10(a) of the Act to prevent the commission of unfair labor practices "affecting commerce."[11] As shown in the Statement, *supra*, p. 3, in 1973, the Company purchased goods and materials valued at $3,600 from firms in New York which in turn, received those goods and materials from firms located outside New York. During the same year, the Company performed services valued at $18,294 for firms that were directly engaged in interstate commerce. Based on these facts, it is clear that the Company's operations "affect commerce" within the meaning of the Act, and that the Board therefore has statutory jurisdiction over the Company. It is well settled that "in passing the National Labor Relations Act, Congress intended to and did vest in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause." (Emphasis in original.) *N.L.R.B. v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963). The Board's statutory jurisdiction does not depend on any particular volume of commerce affected, provided it is more than *"de minimis."* *N.L.R.B. v. Fainblatt*, 306 U.S. 601, 607 (1939). While no mathematical formula is available for determining exactly what is *de minimis*, it is well-settled that "*de minimis* in the law has always been taken to mean trifles – matters of a few dollars or less." *N.L.R.B. v. Suburban Lumber Co.*, 121 F.2d 829, 832 (C.A. 3, 1941), cert. denied, 314 U.S. 693. As shown above, the amount of the Company's indirect interstate business totals $21,894 annually. The time has not yet arrived when this can be considered but a trifle. *Community Currency Exchange, Inc. v. N.L.R.B.*, 471 F.2d 39, 42

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[11] Section 2(7) of the Act defines the term "affecting commerce" to mean "in commerce, or burdening or obstructing commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

(C.A. 7, 1972); *N.L.R.B. v. Aurora City Lines, Inc.*, 299 F.2d 229, 231 (C.A. 7, 1962); *N.L.R.B. v. Inglewood Park Cemetery Ass'n.*, 355 F.2d 448, 450-451 (C.A. 9, 1966), cert. denied, 384 U.S. 951. It is true that the Board has chosen for policy reasons to limit its exercise of this jurisdiction, and ordinarily will not hear cases involving non-retail enterprises having interstate transactions totalling less than $50,000 annually. *Siemons Mailing Service*, 122 NLRB 81 (1958). The Board, however, is free to disregard this self-imposed limitation so long as it does not do so discriminatorily or arbitrarily, and there is a statutory basis for its jurisdiction. *N.L.R.B. v. Pease Oil Co.*, 279 F.2d 135, 138 (C.A. 2, 1960); *N.L.R.B. v. WGOK, Inc.*, 384 F.2d 500, 502 (C.A. 5, 1967); *N.L.R.B. v. West Side Carpet Cleaning Co.*, 329 F.2d 758, 760 (C.A. 6, 1969); *Lucas County Farm Bureau v. N.L.R.B.*, 289 F.2d 844, 845-846 (C.A. 6, 1961), cert. denied, 368 U.S. 823; *N.L.R.B. v. Jones Lumber Co.*, 245 F.2d 388, 391 (C.A. 9, 1957). "Whether to assert jurisdiction in a given case is a matter within the Board's discretion and the Board's decision may be overturned by a court only when that discretion has been abused." *N.L.R.B. v. Pease Oil Co., supra*, 279 F.2d at 138. We submit that the Board did not abuse its discretion in this case.

As shown *supra*, p. 4, the Union originally sought certification as the majority representative of the Company's employees by filing a petition with the New York State Labor Relations Board. A prehearing conference was held in that proceeding on December [illegible], at which the Company's counsel stated that the Company had an annual volume of business of $100,000 and made purchases in excess of $50,000, and that he believed that the NLRB had jurisdiction over the Company (A. 31-34, 35-36). On the basis of this information, the Union withdrew its petition with the State agency, and on December 19, filed a petition for a representation election with the NLRB (Board Case No. 29-RC-2533) (A. 35-

36).[12] At a hearing held by the Regional Director on that petition the Company's counsel stipulated that "during the past 12 months it has purchased and received electrical supplies valued in excess of $50,000 from firms located within the State of New York, which firms received said [supplies] from manufacturers outside the State of New York" (A. 35-36).[13] In the Regional Director's Decision and Direction of Election issued on January 16, 1974, jurisdiction was asserted over the Company on the basis of the Board's discretionary standards for nonretail business (A. 35-36). No request for review of the Regional Director's decision was filed by the Company, as authorized by the Board's Rules and Regulations, Sec. 102.67(b) (29 C.F.R.). Nor did the Company at any time prior to the election conducted pursuant to the Regional Director's decision file a motion for reconsideration of his decision on the basis of newly discovered evidence (A. 35-36). Accordingly, the election was held on February 8, 1974 *(ibid.)*.

A complaint based on the unfair labor practices in the instant case issued on May 16, 1974, and on May 21, the Regional Director ordered that a consolidated hearing be held on the issues raised by the complaint and those relating to the challenged ballots. At a prehearing conference scheduled prior to the scheduled consolidated hearing, the Company for the first time made the claim supported by relevant data that it did not meet the Board's discretionary jurisdictional standards (A. 35-36). Based

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[12] An affidavit filed with the Board by the Union's attorney related what occurred at the NYSLRB hearing, and in the absence of any contrary information or a counter-affidavit by the Company, the facts stated were accepted as true by the Board in Case No. 29-RC-2533 (A. 35-36).

[13] This stipulation is contained in the transcript of the hearing held before a Board Hearing Officer on January 11, 1974, in Board Case No. 29-RC-2533.

on the Company's showing, on July 10, 1974, the Regional Director ordered the unfair labor practice complaint and representation petition dismissed, and the election results set aside *(ibid.)*. The Union filed requests for review of these actions with the Board and General Counsel. Finding merit to the Union's request, the Board, in a ruling issued on November 14, 1974 (214 NLRB No. 150), ordered the representation petition reinstated *(ibid.)*. The Board based its ruling on the Company's concession at the pre-election hearing that it met the Board's jurisdictional standards and its subsequent failure to file a request for review with the Board of the Regional Director's Decision and Direction of Election in which he asserted jurisdiction over the Company *(ibid.)*. Following the Board's decision to reinstate the representation case and to assert jurisdiction over the Company, the General Counsel also granted the Union's appeal from the dismissal of the original unfair labor practice complaint and on December 6, 1974, the Regional Director issued another complaint – the one that is the basis for the instant proceeding.

In its decision herein the Board noted its assertion of jurisdiction over the Company in the earlier representation proceeding and applied the precedent of that ruling to this case (A. 4-5). In so doing, the Board rejected the Company's contention that it should have the opportunity in the instant proceeding to introduce evidence showing that is not within the Board's discretionary jurisdictional standards. The Board's ruling in this regard was clearly warranted, for the Company by its own conduct had waived the right to challenge the Board's assertion of jurisdiction, first, by conceding the jurisdictional facts before the NYSLRB, and later, by making the same concession in the Board representation proceeding. Further, as noted above, the Company failed to follow the procedure provided by the Board's rules by which it could have filed an exception with the Board to the Regional Director's assertion of jurisdiction. By failing to note a timely exception to the Regional Director's

ruling, the Company forfeited its standing to challenge that ruling in a subsequent proceeding. Cf. *N.L.R.B. v. Rexall Chemical Co.*, 370 F.2d 363, 365-366 (C.A. 1, 1967); *N.L.R.B. v. Rod-Ric Corp.*, 428 F.2d 948, 950-951 (C.A. 5, 1970), cert. denied, 401 U.S. 937. By the same token, the Board, having found grounds for asserting jurisdiction over the Company in the representation proceeding, followed its long-established policy, analogous to the doctrines of *res judicata* and collateral estoppel, of prohibiting relitigation of the same issue in a subsequent proceeding between the same p[illegible]ies. *Monroe Feed Store*, 112 NLRB 1336 (1955); *Peyton Packing Co.*, [illegible]29 NLRB 1358 (1961); *Jack L. Williams, D.D.S., d/b/a Empire Dental Co.*, 211 NLRB 860 (1974); and see *International Union of Electrical, etc. Workers v. N.L.R.B.*, 367 F.2d 333 (C.A.D.C., 1966); *N.L.R.B. v. Deaton Truck Line, Inc.*, 389 F.2d 163, 167-168 (C.A. 5, 1968); *N.L.R.B. v. Brown & Root, Inc.*, 203 F.2d 139, 146 (C.A. 8, 1953).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that exercise of jurisdiction in this case was proper and that the Board's order should be enforced in full.

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March 1976.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	)	
v.	)	No. 75-4264
POLLACK ELECTRIC COMPANY, INC., Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

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/s/ Elliott Moore
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NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.
this 23rd day of March, 1976.